Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Replacement of Part 90 by Part 88	)	
to Revise the Private Land Mobile	)	PR Docket No. 92-235
Radio Services and Modify the	)	
Policies Governing Them	)	
	)	
and	)	
	)	
Examination of Exclusivity and	)	
Frequency Assignment Policies of	)	
the Private Land Mobile Radio Services	)	

To: The Commission

REPLY TO "JOINT OPPOSITION OF API, UTC AND AAR TO PETITIONS FOR PARTIAL RECONSIDERATION FILED BY MRFAC, INC. AND FIT"

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SUMMARY

The AAR/API/UTC Opposition fails to answer the key points raised by MRFAC in its Petition for Partial Reconsideration of the shared frequency coordination rule.

MRFAC demonstrated in its Petition (and accompanying Motion for Expedited Partial Stay, which was granted) that the rule was adopted without the notice required by the Administrative Procedure Act, and was arbitrary and capricious as applied to U.S. manufacturers. In particular, MRFAC showed that the rule (requiring AAR/API/UTC/AAA coordination for any frequency shared by one of their industries or, if they so chose, concurrence) contravened the full and fair competitive coordination which was one of re-farming's chief goals; and that there was no showing that MRFAC coordinations had ever caused any of the interference problems which the opponents had complained about. Since the effect of the rule would be to jeopardize U.S. manufacturers' access to channels shared co-equally and harmoniously with pipelines and utilities for over 40 years -- spectrum resources essential to an industry which represents the backbone of the U.S. economy -- the rule was unreasonable and unlawful. This is particularly the case since an industry-neutral, equally-effective alternative was readily available which raised none of the problems of the new rule; namely, reciprocal protected contours for incumbents on the subject VHF and UHF channels shared by manufacturers, pipelines, utilities and one or two other industries.

The Opposition's argument that the new rule was a logical outgrowth of the 1992 Notice of Proposed Rulemaking (which could have led to consolidation into three pools, a result, according to the opponents, more extreme than the rule actually adopted) overlooks the fact that the Commission issued a Second Report and Order in 1997 resolving the consolidation question in favor of only two pools; that this determination had long been in effect when the new

coordination rule was adopted; and that the only petition for reconsideration which even remotely touched upon the matter (API's) sought a form of relief (protection only for existing petroleum licensees) far removed from the rule adopted. In addition, the cases chiefly relied upon by the opponents are readily distinguishable.

Insofar as the merits are concerned, the Opposition fares no better: It does not answer, or even address for that matter, MRFAC's suggestion that the Commission should adopt protected contours for incumbents on the subject channels regardless of industry; that this would be consistent with the historic reciprocity which has characterized manufacturer, pipeline and utility access to the shared frequencies; that this approach would provide every bit as much interference protection as the opponents could expect; and that a refusal to accept reciprocity would reveal an agenda driven more by spectrum annexation than interference.

MRFAC's Petition should be granted: Co-equal access to the subject channels for manufacturers and a level coordination playing-field should be restored.

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MRFAC, Inc. ("MRFAC") by its counsel, hereby replies to the "Joint Opposition of API, UTC and AAR to Petitions for Partial Reconsideration filed by MRFAC, Inc. and FIT." As discussed below, there is no merit to the Opposition's arguments; the coordination rule announced in the Second Memorandum Opinion and Order, FCC 99-68 , 64 Fed. Reg. 36258 (1999)("Order on Reconsideration" or, simply, "Order") is unlawful and should be replaced with a readily-available, equally-effective, competitively-neutral alternative.

BACKGROUND

In the Order on Reconsideration, the Commission concluded that American Petroleum Institute ("API"), United Telecom Council ("UTC"), and American Association of Railroads ("AAR") should have a coordination prerogative over all channels that their respective

industries have shared with any other industry.[1] This ruling primarily affects the manufacturing, forest products and telephone industries -- the majority of whose frequencies for decades have been shared with pipeline and utility companies.

In its Petition MRFAC urged that the shared frequency coordination rule should be rescinded inasmuch as it was adopted without adequate notice as prescribed by the Administrative Procedure Act, 5 USC § 553(b); and was, in any event, arbitrary and capricious.

As to the former, MRFAC observed that at no point in its Re-Farming Notices and Orders did the Commission suggest that it would (1) handicap certain coordinators as against others in the new competitive coordination marketplace, i.e. that it would grant some super-primary status to API/UTC/AAR for frequencies which MRFAC had coordinated for manufacturers for years; or (2) penalize manufacturer applicants by making their continued access to spectrum resources historically shared with pipelines and utilities subject to a lopsided coordination regime under which the pipeline and utility industries would, for the first time, unilaterally control access to the spectrum.

As to the latter, MRFAC noted that the petitioners had not contended that MRFAC had been the source of any applications they considered problematic. On the contrary, the petitioners conceded that coordination relations with MRFAC had been harmonious over the years (as befits industries which have been spectrum neighbors in the same pools of frequencies). Further, MRFAC urged that the rule would penalize manufacturer applicants seeking to use the services of MRFAC, FIT, or any other coordinator for that matter, by requiring the applicant to

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[1] The Order extended the same relief to a fourth entity, American Automobile Association, which is the coordinator for the former Automobile Emergency Radio Service frequencies. Manufacturers have not shared these frequencies.

pay for an extra coordination and suffer additional delay; that this represents a radical departure from the pro-competitive goals enunciated by the Commission for re-farming, unsupported by substantial evidence or adequate explanation; and that alternatives were available which would adequately address the opponents' safety concerns (as well as those of manufacturers) without eviscerating elementary principles of fair competition.

At the same time MRFAC (and FIT) sought a stay of the new rule to allow for consideration of their respective Petitions for Reconsideration. The Commission granted the stay in the Fourth Memorandum Opinion and Order, FCC 99-203, released August 5, 1999. In so doing the Commission held that:

> MRFAC and FIT have raised substantial issues regarding the propriety and utility of the rule changes adopted in the *Second Memorandum Opinion and Order*. It is likely that they will incur much greater harm if the rules are permitted to take effect than might accrue to UTC and API if they are stayed. We conclude, therefore, on balance, that MRFAC and FIT have shown that it is in the public interest to grant the requested stay while the Commission examines these issues, in order to permit frequency coordinators to continue coordinating frequencies they have coordinated for years, and preserve coordination customers' options.

In their Opposition AAR et al argue that the new rule was in character with the agency's "broad[] inquiry[y]" into re-farming policies and consolidation; that in the 1992 Notice of Proposed Rulemaking, 7 FCC Rcd 8105 (1992), the Commission invited comment on various consolidation alternatives which "will fulfill the goals and objectives of this proceeding";[2] that in the First Report and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 10076 (1995), the agency noted that no consensus had been reached within the private radio community

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[2] Opposition at note 14 quoting from Notice, 7 FCC Rcd at 8111.

on consolidation and invited further comment on proposals "representative of the interests and needs of the PLMR community and frequency coordinators";[3] that the Second Report and Order, 12 FCC Rcd 14307 (1997), adopted protections for frequencies formerly allocated on an exclusive basis for railroad, power and petroleum users; and, finally, that the rule should be viewed as merely a compromise compared with creation of a separate pool.[4] The Opposition thus argues that the rule is a logical outgrowth of API's Petition for Reconsideration, citing in support AT&T Corp. v. FCC, 113 F.3d 225 (D.C. Cir. 1997).

DISCUSSION

A. The Opposition's Logical Outgrowth Arguments Are Unpersuasive.

The opponents' attempt to show that the coordination rule is a "logical outgrowth" is unpersuasive for several reasons.

First. The opponents' misstate the issue in their analogy to a third pool. Prior to the Second Report and Order the Commission could have created a third pool for the opponents' industries or others for that matter. However, the coordination rule was not adopted prior to the Second Report and Order; it was adopted over two years later -- after two pool consolidation had long become effective. Moreover, the only Petition for Reconsideration which even remotely touched on the issue was strictly limited in the relief it sought to the adoption of protected contours for existing petroleum systems only -- not a separate pool.[5] The Opposition disregards

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[3] Id. at p. 9 quoting from the Further Notice, 10 FCC Rcd at 10106.

[4] Id. at p. 11.

[5] API's Petition provides no basis for the rule actually adopted, or a basis for extending the rule to future petroleum licensees, much less licensees in other industries such as utilities or railroads. Indeed, the Opposition's assertion that extension of the coordination rule to utilities and railroads was a "logical outgrowth" of API's Petition is contradicted by the express terms of the Petition itself which states, at p. 6: "It is important to emphasize that the proposed PSCs would apply only to current Petroleum Radio Service systems." (emphasis added.) It should also be

these key facts in setting up its analogy. Indeed, one of the very cases cited by the Opposition (at note 24), Omnipoint v. FCC, 78 F.3d 620 (D.C. Cir. 1996), well illustrates the notice deficiency here. In that case the Commission had adopted a rule governing auction bidding credits for women and minorities. When the Supreme Court issued its decision in Adarand Constructors v. Pena, 515 U.S. 200 (1995), the Commission concluded that the bidding credit rule should be revised and issued a Further Notice of Proposed Rulemaking on an expedited schedule. Here, by contrast, the agency issued no further notice before adopting the coordination rule.

Second. Apart from the above, the opponents' arguments ignore -- indeed, fly in the face of -- the Commission's own statements in the Order on Reconsideration. In that Order the agency addressed three separate filings relevant here: (1) the August 1998 Petition for Rulemaking filed by UTC et al seeking a separate pool; (2) the June 1998 API/UTC request for a freeze on the acceptance of any applications for frequencies occupied by their constituents; and (3) the API Petition for Reconsideration which sought adoption of protected contours for then-existing petroleum licensees. Each and every one of these requests -- including in particular, the separate pool request which the petitioners reference by comparison -- was held to be "outside the scope" of the Order. See id. at note 32 (separate pool); at para. 13 (freeze request); and at para. 8 (API protected contour request). Thus, the Opposition's reliance on the notion that the shared frequency coordination rule is merely a subset of a third pool, which the Commission could just as easily have adopted, is again without foundation.

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noted that MRFAC's qualified support for the API Petition was registered long before AAR et al filed their Petition for Rulemaking seeking creation of a separate pool by appropriating approximately 60 percent of the frequencies previously available to manufacturers. Under the circumstances, MRFAC today can only support the protected contour concept if it were made mutual and reciprocal for manufacturer licensees on the VHF and UHF channels shared with pipelines et al. More on this later.

Third. Reliance on the 1992 Notice proves far too much. One of the cornerstones of re-farming from day one has been an effort on the Commission's part to bring the benefits of competition to the coordination marketplace by consolidating the 20 separate radio services. Notice at para. 6 (changes proposed to "improve quality of service"); at para. 16 (interservice sharing rules between and among 20 separate services "expensive, time-consuming and burdensome to the applicant..."). [6] Thus, the Commission proposed in the Notice that, if the radio services were consolidated, any of the Industrial and Business coordinators would be entitled to coordinate any of these frequencies. Id. at para. 18 and page 22 (e.g. frequencies "may be coordinated by any certified coordinator").

Likewise, in the First Report and Order and Further Notice of Proposed Rulemaking, the Commission stressed its "intention to create competition in the frequency coordination function by allowing users in the newly created service groups to use the services of any recognized frequency coordinator." Id. at para. 50; accord id. at para. 54 (in the Notice "we specifically proposed that licensees be permitted to use any frequency coordinator desired"); id. (Commission's purpose is to "promote competition and benefit PLMR users").

By any standard the Order's coordination rule represents a marked departure from the above-referenced goals, rather than a "logical outgrowth." In skewing the coordination marketplace in favor of certain coordinators and against others, the rule departs from the Commission's clear statements that, if it were to consolidate the radio services, coordinators would be able to coordinate any frequency. In MRFAC's case, most of the many thousands of

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[6] Accord Second Report and Order, 12 FCC Rcd 14307 at paras. 38 and 40 (competitive coordination "should result in lower coordination costs and better service to the public"); para. 51 (Commission describes its effort as being "to increase the quality of customer service through competition").

applications it has coordinated over the years are for the very frequencies which the rule places within the exclusive preserve of API/UTC/AAR. No one could have predicted this result.[7]

Furthermore, as MRFAC explained previously in its stay request, the coordination rule will require manufacturers seeking to use their traditional coordinator to pay more (for an API/AAR/UTC coordination) and wait longer than without the rule -- results diametrically at odds with the Commission's interest in bringing the benefits of competition to the coordination marketplace. And this is under the best case scenario: Absent the reciprocity which has existed for 40 years for these frequencies, manufacturer proposals to use frequencies historically available to them, but shared with the opponents, could be tied up in knots for weeks and months on end resolving objections.[8] No right-thinking business person would put up with that kind of delay -- instead he or she will be forced to another, less desirable frequency.[9]

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[7] With all due respect, the notion that a customer will continue to work with a coordinator "regardless of any additional administrative procedures that may be entailed" (Opposition at p. 17) is absurd. In this regard certain of the opponents have been candid in stating their desire to expand market share. See Telecommunications Report, July 16, 1999 (UTC issues press release publicizing its intention to "expand the concept embodied in our name" to include "its newest constituency group which includes large financial service companies, health care providers, and multinational manufacturing companies"). This is their right in a competitive marketplace. But if there is to be competition, it must be fair.

[8] The fact that an objecting coordinator must provide a statement of reasons for a denial is of no comfort. Opposition at 18. It is not the opportunity to contest an objection that an applicant is looking for -- it is efficient access to desired frequencies.

[9] These are not idle concerns. On the contrary, they are based on what the separate pool proponents themselves have said in their filings with the Commission. For example, in their Petition for Rulemaking API/UTC/AAR argue that a separate pool is needed because "[t]he number of channels available to meet the evolving needs of utilities, pipelines and railroads will continue to shrink as the FCC's refarming rules are implemented and new industrial ... users begin 'gobbling up' new offset channels". Id. at 11. In their joint Comments filed August 2, 1999 in WT Docket No. 99-87, they argue that a separate pool is needed to prevent "encroachment from other 'industrial' services," i.e. including manufacturers. Id. at 19. To like effect are numerous cookie-cutter comments filed by various water utilities in the same proceeding. API's own frequency coordinator, Industrial Telecommunications Association, has aptly described the shared frequency coordination rule as creating a "de facto separate pool." Comments filed August 2, 1999 in WT Docket No. 99-87 at 12. Indeed, in the Opposition (at p. 20) the pipelines et al. are heard to assert that they should have a veto right even over manufacturer applications which do not entail contour overlap! See also Joint Reply Comments of The National Association of Manufacturers and MRFAC, Inc. in WT Docket No. 99-87 for a further discussion of this issue.

Finally, the Opposition's reliance on AT&T v. FCC is misplaced. Id. at 7-8. In this case AT&T challenged a Commission Rule that proscribed use of customers' billing names and addresses ("BNA") for the marketing of long-distance services. (The Commission had adopted a rule on reconsideration at an earlier stage of the proceeding that allowed use of BNA for equal access but expressly barred it for marketing purposes.) In a further order on reconsideration, the Commission held that it meant what it said, i.e. that the use of BNA in connection with equal access was not meant to be a "loophole that would eviscerate" the marketing rule. Id. at 228-29. AT&T challenged that interpretation on the grounds that it was arbitrary and capricious.

Thus, the AT&T case stands for the common-sense proposition that in determining whether an agency's justification for its interpretation of a rule passes muster under the arbitrary and capricious test, a court can and should consider the entire rulemaking including the agency's earlier stated rationales for the rule. However, since the Commission's BNA interpretation did not represent any change at all in the agency's earlier stated position, the court never had to decide whether the interpretation was a "logical outgrowth" of the rule. See id. at 229 ("there is nothing in the record to suggest that the FCC changed its position").

The instant case is dramatically different. Even the opponents do not claim that the Order's coordination rule did not represent a change; rather, they argue that it did not represent a significant enough change to require prior notice. Likewise, the proposition for

which they cite AT&T (logical outgrowth) is not the issue upon which the case turned -- the issue was whether the agency's justification for its interpretation was arbitrary or capricious.[10]

In summary, the Opposition fails to rebut the Petition's premise that the coordination rule was not a "logical outgrowth."

B. The Rule Is Arbitrary and Capricious.

The Opposition references several instances of interference which, it contends, justifies the rule. But if interference protection is the opponents' concern, they should have no objection to the adoption of protected contours for other incumbent licensees, including manufacturers, that share the same frequencies. Such a rule would adequately protect their systems; would be competitively neutral; would be consistent with the contour overlap approach adopted for trunked systems in the Third Memorandum Opinion and Order, FCC 99-138, released July 1, 1999); and would be in accord with the reciprocity principles that historically governed use of these shared frequencies prior to consolidation. A refusal to accept this approach, on the other hand, would underscore the concerns referenced above that the effect of the rule would be to create a de facto separate pool.[11]

Moreover, the shared VHF and UHF radio channels at issue here provide a vital safety link for manufacturing employees -- a link that should be no more exposed to harmful

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[10] National Resources Defense Council v. EPA, 824 F.2d 1258 (1st Cir. 1987), cited in the Opposition at note 21, likewise does not help its case. If anything, Natural Resources Defense Council underscores the notice deficiency to the Order's rule inasmuch as there, as here, interested parties were not afforded "a fair opportunity to present their views on the contents of the final plan." Id. at 1284 (holding that challenged EPA rule could not be viewed as a "logical outgrowth").

[11] Prior to the Second Report and Order manufacturers, utilities and pipelines had co-equal access to the pooled frequencies at issue. Since the three industries (and their coordinators) had co-equal access, there was a salutary assurance that no one sharing industry (or coordinator) would, or could, use the concurrence process to unfairly advantage its constituents as against those of another sharing industry. The new rule does away with these protections.

interference than the opponents' systems. On the contrary, given the much larger number of injuries unfortunately suffered by manufacturing workers than those in the other three industries,[12] it would be unconscionable to deprive them and their families of the security of knowing that the radio channels their lives depend upon will be protected by the same contour overlap approach the opponents seek for themselves.

Furthermore, the rule's restriction on co-equal access to the subject frequencies which manufacturers have long enjoyed threatens productivity. Manufacturing is the backbone of the U.S. economy,[13] and the spectrum resources at issue here are vital to the dramatic productivity goals registered by American manufacturing in the past 15 years. The subject channels are heavily relied upon by manufacturers (which operate more than 25,060 radio systems and over 308,000 transmitters based on data five years old[14]). For this reason, too, reciprocity should be restored.

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The points made above respond to the core of the Opposition. However, for the sake of completeness a few additional thoughts are in order:

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[12] In 1997 U.S. manufacturing workers suffered 1,662,100 occupational injuries. By contrast the transportation (including railroads and pipelines) and utility industries combined experienced one-third as many injuries (477,000). *Workplace Injuries and Illnesses in 1997*, Bureau of Labor Statistics, USDL 98-494, Table 2 (December 17, 1998). If interference-free channels are important to pipeline and utility workers, as petitioners urge and we do not dispute, they are at least as -- if not more -- important for the safety of manufacturing workers.

[13] Manufacturing is the largest single contributor to the Gross Domestic Product. Manufacturing is also the single largest employer of the American workforce: Approximately 18 million people. *The Facts About Modern Manufacturing*, The Manufacturing Institute, at 31. Without intending to suggest any lack of importance to other industries, we note that in 1998 the petroleum industry employed approximately 938,600 persons and the railroad industry 472,700. The utility industry including electric, gas, and water employed approximately 1,310,000. *Bureau of Labor Statistics* (September 28, 1999) <http://www.stats.bls.gov>.

[14] Wireless Telecommunications Bureau Staff White Paper (December 8, 1996), Appendix B.

The opponents argue that the rule is necessary because they can have no assurance that MRFAC will continue harmonious coordination; and that they should not have to wait for problems to emerge before the Commission puts into effect "a rule of general applicability" for safety reasons. Id. at 15. However, the opponents have not even claimed, much less demonstrated, a pattern of coordination problems from coordinators like MRFAC with which they have shared channels. At the same time, MRFAC could not agree more that the proper solution is "a rule of general applicability" (emphasis added) -- i.e. protected contours for incumbent licensees on the subject VHF/UHF channels whether they be pipelines and utilities, or manufacturers, forest products companies and telephone companies.[15]

The Opponents also object to the proposal that they be given notice and a waiting period to allow for objection (Opposition at p. 20). Such an approach would ensure that the applicant need not pay an extra fee for an AAR/API/UTC concurrence. Unfortunately, while it would solve the extra fee issue, it would not address the more fundamental problem with the rule: Only reciprocity (or no rule at all) can do that.

CONCLUSION

The Joint Opposition is unpersuasive. The Order's coordination rule lacked proper notice and is otherwise arbitrary and capricious.

This is one of those uncommon situations where the Commission can grant the relief a petitioner seeks while at the same satisfying the opponents' reasonable expectations.

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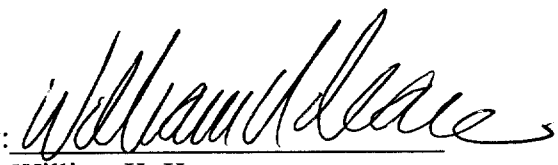
[15] The opponents state that they do not intend MRFAC and FIT to send their coordination business to them, just exercise a concurrence. Id. at 16. However, in a competitive marketplace, consumer perception is sovereign. MRFAC has already encountered situations where potential customers were of the view that the rule requires AAR/API/UTC coordination in the first instance.

That solution is readily at hand: Reciprocity of protected contours between and among the incumbent licensees who have so long shared the subject channels.

Respectfully submitted,

MRFAC, Inc.

By: 
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CERTIFICATE OF SERVICE

I, Joseph C. Fezie, hereby certify that a true copy of the attached Reply to "Joint Opposition of API, UTC and AAR to Petitions for Partial Reconsideration Filed by MRFAC, Inc. and FIT" has been sent first-class, U.S. mail, to the following, this 14th day of October, 1999:

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